CLERK'S COP

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 519

AMERICAN GLUE COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 21, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

(35,441)

(35,441)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 519

AMERICAN GLUE COMPANY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

INDEX

	Page
Proceedings in United States circuit court of appeals, first circuit	1
Caption	1
Record from district court of the United States, district of Massachusetts	1
Petition	1
Answer	4
Substituted agreed statement of facts	5
Exhibit A—Letter, August 18, 1924, Bright to petitioner	8
Exhibit B—Extract from claim for refund	9
Minute entry of hearing	12
Judgment	12
Substituted bill of exceptions and order allowing same	12
Exhibit A—Collector's card record	20
B—Restricted assessment waiver	21
C—Letter, November 3, 1923, petitioner to collector	22
D—Claim for abatement	23
Opinion, Brewster, J	25
Petition for appeal and order allowing same	33
Assignment of errors	33
Bond on appeal	37
Citation and acknowledgment of service thereof	38
Certificate of clerk	39
Clerk's certificate	40
Order allowing certiorari	41

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 28, 1930

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

OCTOBER TERM, 1929.

No. 2497.

AMERICAN GLUE COMPANY,
PETITIONER, APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

TRANSCRIPT OF RECORD OF DISTRICT COURT.

No. 3510, LAW DOCKET.

AMERICAN GLUE COMPANY, PETITIONER,
v.
UNITED STATES OF AMERICA.

The petition in this cause was filed in the clerk's office on the fifteenth day of January, A. D. 1929, and was duly entered at the December Term of this court, A. D. 1928, and is as follows:

PETITION.

[Filed January 15, 1929.]

Now comes the American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and having a usual place of business in Boston in said Commonwealth, and respectfully petitions as follows:

1. The petitioner duly filed in the year 1918 its income and excess profits tax returns for its fiscal year 1917, being the calendar year 1917, as required by the Revenue Act of 1916 as amended and by the Revenue Act of 1917, and the regulations of the Com-

missioner of Internal Revenue approved by the Secretary of the Treasury made thereunder, and in said year 1918 paid the income and excess profits taxes shown by such returns to be due from it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the petitioner and affiliated corporations, and the taxes paid by said petitioner included its share of the excess profits taxes of the affiliated group as shown on such return.)

2. In the year 1920 the Commissioner of Internal Revenue assessed upon the petitioner additional income and excess profits taxes for said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed upon the affiliated group was $184,212.83, and said amount of $173,674.61 included the share of the additional excess profits tax assessed upon the affiliated group allocated to the petitioner and the additional income tax assessed upon the petitioner.)

3. Thereafter, on November 6, 1920 the Collector of Internal Revenue for the District of Massachusetts made demand upon the petitioner for the sum of $173,674.61 assessed as aforesaid, and on November 16, 1920, the petitioner paid to said Collector the sum of $2,450.80 and declined to pay the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81.

4. On or about September 2, 1925 the Collector of Internal Revenue for the District of Massachusetts, by his deputy collector George W. B. Britt, issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the property of the petitioner to collect said taxes and the interest thereon and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the petitioner's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes amounting to $171,223.81 and interest thereon amounting to $62,040.08. The Collector of Internal Revenue by whom such tax and interest was collected is not now in office as Collector of Internal Revenue.

5. On or about December 31, 1925 the petitioner duly filed with

the Commissioner of Internal Revenue a claim for refund for $233,263.89, or such greater amount as is legally refundable, and interest thereon from November 24, 1925, on the ground among others that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that such collection was made by a "proceeding" within the meaning of Section 250, subdivision (d) of the Revenue Act of 1921, which is applicable to the taxes in question, and that such "proceeding" was begun after the expiration of five years after the date when the petitioner's returns were filed as aforesaid.

6. More than six months has expired from the date of filing such claim for refund, to wit, December 31, 1925, and on or about October 9, 1926 said Commissioner of Internal Revenue disallowed said claim for refund.

7. The period of five years after the date when the petitioner's returns were filed as aforesaid expired during the year 1923. The petitioner never has waived the Statute of Limitations on the collection of said taxes and interest. No suit or proceeding for the collection from the petitioner of the taxes in question (or any interest thereon) was begun prior to the expiration of said five years.

8. The petitioner claims that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that such collection was made by a "proceeding" within the meaning of Section 250, subdivision (d) of the Revenue Act of 1921, which is applicable to the taxes in question, and that such "proceeding" was begun after the expiration of five years after the date when the petitioner's returns were filed as aforesaid.

9. Wherefore the United States owes the petitioner the sum of $233,263.89, together with interest thereon.

10. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no person other than the petitioner is the owner thereof or interested therein and no assignment or transfer of this claim or any part thereof or of interest therein has been made. The petitioner is justly entitled to the amount herein claimed from

the United States after the allowing of just credits and offsets. The petitioner at all times has borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

Wherefore the petitioner prays judgment against the United States of America upon the facts and law for the sum of $233,263.89 with interest thereon from November 24, 1925 and its costs and disbursements.

AMERICAN GLUE COMPANY,
by ROBERT W. YOUNG, *Treasurer.*

COMMONWEALTH OF MASSACHUSETTS,
SUFFOLK, SS. JANUARY 14, 1929.

Then personally appeared Robert W. Young, treasurer of American Glue Company, and made oath that the foregoing petition by him subscribed is true to the best of his knowledge, information and belief. Before me,

ROGER UPTON,
[SEAL] *Notary Public.*

At the same term, to wit, February 20, 1929, the following Answer was filed:

ANSWER.

[Filed February 20, 1929.]

Now comes the defendant in the above-entitled action and for its answer to the petition,

1. Admits each and every allegation in paragraphs 1, 2, 3, 4, 5 and 6 of the petition.

2. The defendant admits the allegations contained in paragraph 7 of the petition, except the allegation that the petitioner never has waived the statute of limitations in the collection of the tax and interest, which allegation the defendant denies.

3. The defendant denies each and every allegation in paragraph 8 of the petition.

And further answering the allegations in paragraph 8 of the petition the defendant says that on November 15, 1920 the petitioner filed a claim in abatement for the amount of $171,223.81

which stayed the collection of the tax within the meaning of Section 611 of the Revenue Act of 1928, and that by reason thereof the payment of the tax more than five years after the petitioner's return was filed did not constitute an overpayment within the meaning of Section 607 of the Revenue Act of 1928.

4. The defendant denies each and every allegation in paragraph 9 of the petition.

5. The defendant admits the allegations in paragraph 10 of the petition except the allegation that the petitioner is justly entitled to the amount herein claimed from the United States after the allowing of just credits and offsets, which allegation the defendant denies.

By its Attorneys,

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

This cause was thence continued from term to term to the September Term, A. D. 1929, when to wit, October 15, 1929, an agreed statement of facts was filed.

Said cause was thence continued to the December Term, A. D. 1929, when, to wit, December 23, 1929, the following Substituted Agreed Statement of Facts was filed:

SUBSTITUTED AGREED STATEMENT OF FACTS.

[Filed December 28, 1929.]

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts shall be taken as true, provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts herein stipulated to be taken as true:

1. On or about May 1, 1918 the petitioner, American Glue Company, duly filed its income and excess profits tax returns for its fiscal year 1917, being the calendar year 1917, as required by

the Revenue Act of 1916, as amended and by the Revenue Act of 1917, and the regulations of the Commissioner of Internal Revenue approved by the secretary of the treasury made thereunder, and in said year 1918 paid the income and excess profits taxes shown by such returns to be due from it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the petitioner and affiliated corporations and the taxes paid by said petitioner included its share of the excess profits taxes of the affiliated group as shown on such return.)

2. During September, 1920, the Commissioner of Internal Revenue assessed against the petitioner, American Glue Company, additional income and excess profits taxes for the said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed against the affiliated group was $184,212.83, and said amount of $173,674.61 included the share of the additional excess profits tax assessed against the affiliated group allocated to the petitioner and the additional income tax assessed upon the petitioner.)

3. Thereafter, on November 6, 1920, the Collector of Internal Revenue for the District of Massachusetts made demand upon the petitioner for the sum of $173,674.61 assessed as aforesaid, and on November 16, 1920 the petitioner paid to said Collector the sum of $2,450.80 and declined to pay the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81, and filed a claim in abatement for said amount of $171,223.81 on November 15, 1920. The plaintiff submitted additional evidence and arguments in support of its contentions with respect to the merits of the assessment. Bureau-letter dated August 18, 1924 (a copy of which is hereto attached as "Exhibit A" and made a part hereof) was mailed by registered mail from the office of the Commissioner of Internal Revenue and was received by the petitioner in due course of mail.

4. On or about September 22, 1925 the Collector of Internal Revenue for the District of Massachusetts, by his deputy collector, George W. B. Britt, issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the

property of the petitioner to collect said taxes and the interest thereon, and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the petitioner's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes amounting to $171,223.81, and interest thereon amounting to $62,040.08. The Collector of Internal Revenue by whom such tax and interest were collected is not now in office as Collector of Internal Revenue.

5. The amount of $171,223.81, together with interest thereon, amounting to $62,040.08, levied upon and collected as set forth above was transferred by the Collector of Internal Revenue to the treasury of the United States.

6. On December 31, 1925 the petitioner duly filed with the Commissioner of Internal Revenue a claim for refund for $233,263.89, or such greater amount as is legally refundable, based upon the ground that the collection of this tax and interest was illegal and wrongful, because made more than five years from the date the return was filed. A true copy of that portion of said claim for refund relating to the collection of said tax is hereto attached and marked "Exhibit B".

7. More than six months has expired from the date of filing such claim for refund, to wit, December 31, 1925, and on or about October 16, 1926 said Commissioner of Internal Revenue rejected said claim for refund.

8. No other action has been had on said claim in Congress or in any of the departments; no other action on said claim is pending in any court; no person other than the petitioner is the owner thereof or interested therein, and no assignment or transfer of this claim or any part thereof or of interest therein has been made. The petitioner at all times has borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government.

9. Is it hereby agreed that the agreed statement of facts hereto filed on the fifteenth day of October, 1929, be and the same is

hereby withdrawn and that the foregoing substitute agreed statement of facts is filed in place and in lieu thereof.

It is further agreed and stipulated that the agreed statement of facts filed on the fifteenth day of October, 1929 shall not constitute a part of the record in this case.

ROBERT E. GOODWIN,
HARRIS L. GILMAN,
Counsel for the Petitioner.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistent to the United States Attorney,
Counsel for Defendant.

EXHIBIT A.

Copy Registered August 18, 1924

IT:CR:A JHA

American Glue Company, 121 Beverly Street, Boston, Massachusetts.

Sirs: Your claim for the abatement of $171,223.81, a part of the income and excess profits tax for the year 1917, has been examined and is hereby rejected for the reason that an audit of your returns for the year in question discloses a tax liability in excess of the amount previously assessed.

In the determination of this correct tax liability, due consideration has been given the statements made in your claim.

The basis of the additional assessment has been made the subject of a previous communication from this Bureau.

The Collector of Internal Revenue for your district will be officially notified not later than thirty days from the date of this letter of the rejection of the above amount.

Respectfully,

J. G. BRIGHT Deputy Commissioner
by L. T. Lohmann Head of Division.

EXHIBIT B.

(Execute Separate Form for Each Tax Period)

Claim for Refund of Taxes Illegally Collected

State of Massachusetts

County of Suffolk ss:

(Name of taxpayer or purchaser of stamps.) American Glue Company

(Business address.) 121 Beverly Street, Boston, Massachusetts

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

Period from Jan. 1 year 1917 to Dec. 31, year 1917

1. Business in which engaged Manufacture and sale of glue and other products
2. Character of assessment or tax Income and excess profits taxes (State for or upon what the tax was assessed or the stamps affixed.)
3. Amount of assessment or stamps purchased $750,026.31
4. Reduction of Tax Liability requested (Income and Profits Tax) 233,263.89*
5. Amount to be abated 000
6. Amount to be refunded (or such greater amount as is legally refundable) 233,263.89
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) See below **

(If statement covers income tax liability, items 8–11, inclusive, must be answered.)

8. District in which return (if any) was filed Massachusetts
9. District in which unpaid assessment appears
10. Amount of overpayment claimed as credit 000
11. Unpaid assessment against which credit is asked; period from to 000

Deponent verily believes that this application should be allowed for the following reasons: (See attached sheets)

*(Reduction of tax liability requested includes additional assessment 1920—tax, $171,223.81, interest $62,040.08—Total $233,263.89.

** Dates of payment were 1918 $514,311.62
November 16, 1920 2,450.80
November 24, 1925
(Collected by distraint) 233,263.89

Total $750,026.31

AMERICAN GLUE COMPANY
By J. P. Lyman, President

Sworn to and subscribed before me this 30th day of December, 1925
Roger Upton, Notary Public

I.

Illegal Collection

The collection by distraint of the taxes and interest in question was illegal and wrongful, irrespective of the validity of the assessment, and such taxes and interest, with interest thereon from the date of collection thereof (November 24, 1925), should be refunded.

The claimant duly filed its income and excess profits tax returns for the fiscal (calendar) year 1917 as required by law and regulations in the year 1918 and paid the income and excess profits taxes shown by such returns to be due to it, to wit, the sum of $514,311.62. (Said excess profits tax return was a consolidated return for the claimant and affiliated corporations and the taxes paid by said claimant included its share of the excess profits taxes of the affiliated group as shown on such return.)

In the year 1920 the Commissioner of Internal Revenue assessed upon the claimant additional income and excess profits taxes for said year 1917 amounting to $173,674.61. (The aggregate additional income and excess profits tax assessed upon the affiliated group was $184,212.83 and said amount of $173,674.61 included the share of the additional excess profits tax assessed upon the affiliated group allocated to the claimant and the additional income tax assessed upon the claimant.)

Thereafter, on November 6, 1920, the Collector of Internal Revenue for the District of Massachusetts made demand upon the claimant for the sum of $173,674.61 assessed as aforesaid and on November 16, 1920 the claimant paid to said Collector the sum of $2,450.80 and duly filed with the Commissioner of Internal Revenue a *bona fide* claim for abatement in the form and manner prescribed by the law and regulations for the remainder of said sum of $173,674.61, to wit, the sum of $171,223.81.

Said claim for abatement is still pending before the Commissioner of Internal Revenue.

The Revenue Act of 1921, Section 250, subdivision (d), which is applicable to the taxes in question, provides that " no suit or proceeding for the collection of any such taxes under this Act or under prior income and excess profits or war profits tax Acts . . . shall be begun after the expiration of five years after the date when such return was filed, but this shall not affect suits or proceedings begun at the time of the passage of this Act ", with certain exceptions which are not here applicable.

The period of five years after the date when the claimant's returns were filed as aforesaid expired during the year 1923.

No suit or proceeding for the collection of the taxes in question (or any interest thereon) was begun prior to the expiration of said five years.

On or about September 2, 1925 the Deputy Collector of Internal Revenue in charge for the District of Massachusetts issued to John Christoforo, division chief deputy collector, a warrant for distraint directing him to levy upon the property of the claimant to collect said taxes and the interest thereon and on November 24, 1925 said John Christoforo, division chief deputy collector, served said warrant on the Atlantic National Bank of Boston, Massachusetts, and levied upon the claimant's money on deposit with said bank and by force of said warrant and levy thereunder collected said taxes and interest thereon to the aggregate amount of $233,263.89.

The claimant has never waived the statutory limitation upon the collection of said taxes and interest.

The claimant contends that the collection of said taxes and interest by force of said warrant for distraint and levy thereunder was illegal and wrongful for the reason that said collection was by a proceeding within the meaning of said Section 250, subdivision (d) of the Revenue Act of 1921, and such proceeding was begun after the expiration of five years after the date when the claimant's returns were filed.

At the same term, to wit, January 31, 1930, said cause came on to be heard without jury on the aforementioned substituted agreed statement of facts, the Honorable Elisha H. Brewster, District Judge, sitting.

Said cause was thence continued under advisement from term to term to the present June Term, A. D. 1926, when, to wit, June 26, 1930, an opinion of the court is announced, judgment to be entered for the defendant.

On the twenty-ninth day of July, A. D. 1930 a draft bill of exceptions is filed by the petitioner within extended time.

On the twenty-seventh day of August, A. D. 1930, a substituted bill of exceptions is filed and assented to, said substituted bill of exceptions having been allowed by the court, on the twenty-sixth day of said August.

Thereupon, to wit, September 8, 1930, it is considered by the court, the Honorable James A. Lowell, District Judge, sitting, that judgment be entered on the finding of the court for the United States, defendant, and for its costs of suit taxed at

---

PETITIONER'S SUBSTITUTE BILL OF EXCEPTIONS.

[Filed August 27, 1930; Allowed August 26, 1930.]

This is a petition by American Glue Company filed on January 15, 1929, against the United States of America, seeking to recover income and excess profits taxes for the calendar year 1917 in the amount of $233,263.89 and interest alleged to have been illegally collected by seizure of the petitioner's property on November 24, 1925, under a warrant of distraint issued by the Collector of Internal Revenue at Boston, Massachusetts (hereinafter referred to as

the "Collector"). The pleadings are a part of this record and may be referred to as a part of this bill of exceptions.

All requisite conditions precedent to the bringing of this petition were complied with by the petitioner.

The case was tried on January 31, 1930, before Brewster, J. without a jury upon a substitute agreed statement of facts and additional oral testimony. The substitute agreed statement of facts is by reference incorporated into and made a part of this bill of exceptions.

The oral testimony introduced at the trial was, so far as material to these exceptions, to the following effect:

The petitioner's claim for abatement of the tax in question was filed with the Collector at Boston in the District of Massachusetts under date of November 15, 1920. The practice of the Collector's office upon receiving such a claim for abatement was to stamp said claim with the date of receipt and to make a card record which contained complete information as to the amount of the claim, the year for which filed, the name and address of the taxpayer, the date of filing, and the date on which the claim was forwarded to the office of the Commissioner of Internal Revenue at Washington, D. C. (hereinafter referred to as the "Commissioner"). According to such practice the record of the claim was also noted on the taxpayer's account, kept at the Collector's office, before the claim was sent to the Commissioner. A copy of the Collector's card record in the instant case is hereto attached and marked "A".

It was not the custom of the office of the Collector to read over claims in abatement sent to the Commissioner, and the particular claim for abatement in question was merely recorded, noted on the Collector's record card and sent to the Commissioner. The representative of the Collector of Internal Revenue did not read the claim in abatement which was filed in this case and knew nothing of the representations contained therein other than the amount of the claim.

A notice from the Commissioner to the effect that the petitioner's claim in abatement had been rejected was received by the

Collector on April 14, 1921 and then later, on May 11, 1921, a further notice was received by the Collector from the Commissioner, and entry thereof made on the records of the Collector, that such rejection was in error. After the notice and demand of October 25, 1923 was mailed to the plaintiff, the Collector received word from the Commissioner that the plaintiff's claim for abatement was still being considered. According to the records of the Collector, his office was never advised that the claim in abatement was ever finally rejected.

The Collector issued and served upon the petitioner notices and demands for the payment of the tax in question on the following dates, viz: November 6, 1920, April 29, 1921, and October 25, 1923. It was not customary in the Boston Collector's office to send out such notices of demand where the claim in abatement had not been fully acted upon and if the collection of the tax was not jeopardized.

Whether or not collection should be pressed by the Collector was entirely within the discretion of the Collector and he could have collected the tax in question at any time. The Collector and his subordinates were familiar with the provisions of Treasury Regulations 62, Article 1032, and similar regulations as follows:

> "Art. 1032. Claims for abatement of taxes erroneously assessed. . . . The filing for a claim for abatement does not necessarily operate as a suspension of the collection of the tax or make it any less the duty of the collector to exercise due diligence to prevent the collection of the tax being jeopardized. He should, if he considers it necessary, collect the tax and leave the taxpayer to his remedy by a claim for refund."

It was the usual practice of the Collector and his subordinates not to issue warrants for distraint in cases where claims in abatement had been filed and were pending. A member of the staff of the office of the Collector testified that, as far as he knew, the office of the Collector in Boston never brought any suits at law to collect a tax while a claim in abatement was pending.

In this case there was a withholding of the collection of the tax

and administrative delay with respect to the collection thereof up to November 24, 1925, the date of the seizure by distraint. The court found that there was a claim in abatement and delay of collection as a consequence of the claim. During this period the petitioner was actively engaged in contesting the merits of the assessment and evidence was introduced by the respondent that during this period the petitioner requested the withholding of the collection of the tax, pending the determination of the merits of the assessment. Such evidence consisted of correspondence and a restricted assessment waiver dated subsequent to April 30, 1923, the date of the expiration of the period of limitation. All such evidence which referred to activities of the petitioner subsequent to April 30, 1923, the date of expiration of the period of limitation, was objected to by the petitioner and exception taken to the admission thereof. A copy of said restricted assessment waiver is hereto attached marked "B" and made a part hereof. The respondent did not assess any additional tax upon the petitioner subsequent to the date of the filing of the restricted waiver and never made any assessment upon the petitioner in reliance thereon or pursuant thereto.

Among the said correspondence was a letter dated November 3, 1923 from the petitioner to the Collector, the admission of which in evidence was objected to by the petitioner and exception taken thereto. A copy of said letter is hereto attached marked "C".

The respondent offered in evidence the claim in abatement filed by the petitioner on November 15, 1920. A substantial extract from this claim is hereto attached marked "D", but said exhibit does not include the contentions and schedules of the petitioner relating to the merits of its contentions, such portions of said claim being immaterial to the issues raised on this record.

Members of the staff of the office of the Collector testified that the tax in question was not collected prior to the date of the seizure by distraint because the petitioner's claim for abatement was pending. The same witnesses also testified that if the Collector or his subordinates had supposed or understood that the statute

of limitations contained in Section 250 (d) of the Revenue Act of 1921 applied to proceedings by distraint, collection would have been made notwithstanding the pendency of the claim in abatement; that at the time when the Collector made this distraint (about two years and six months after the five year period of limitation had expired) he was led to do so because of the decision of the United States District Court for the Southern District of New York in the case of New York & Albany Lighterage Company *v.* Bowers, holding that distraint was a "proceeding" within the meaning of the term as used in Section 250 (d) of the Revenue Act of 1921, and that one of the reasons, but not the main reason, why the Collector had not undertaken to distrain up to that time was because he believed that distraint proceedings could be instituted and enforced at any time. According to the decision in the case above referred to, the collection of the tax in the instant case was barred.

Soon after the United States District Court for the Southern District of New York had ruled, in the case of *New York & Albany Lighterage Company* v. *Bowers*, that distraint was a "proceeding" and was barred by the said statute of limitations, the Collector proceeded to enforce collection of taxes, including the tax in question.

It was admitted at the trial by counsel for the United States that there was no legal stay in this case which prevented the Collector from collecting the tax at any time. The collection of said tax from the petitioner was barred by the statute of limitations at the time the collection was made.

The foregoing constitute all the facts material to the issues raised by this record.

At the trial of the case the petitioner requested the court to make certain rulings on matters of law, of which the following were denied, viz:

1. The seizure, under warrant for distraint, of the sum of $233,263.89 from the petitioner on November 24, 1925, by the Collector of Internal Revenue for the District of Massachusetts, was illegal and the petitioner may recover from

the United States of America said sum of $233,263.89 with interest thereon from the date of seizure in accordance with the provisions of Revised Statutes 3226 as amended by Section 1111 of the Revenue Act of 1926.

2. The sole purpose and effect of Section 607 of the Revenue Act of 1928 was to enlarge the class of taxpayers who were entitled to sue and recover under the provisions of Section 3226 of the Revised Statutes as amended.

3. Section 607 of the Revenue Act of 1928 did not limit, take away, or in any way affect any right of action which the petitioner had at the date of its enactment.

4. Section 611 of the Revenue Act of 1928 did not take away any right of action which the petitioner had at the date of its enactment.

5. Section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of Section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges whatsoever.

6. The illegal seizure of said sum of $233,263.89 in 1925 by the Collector of Internal Revenue did not effect a payment or satisfaction of the petitioner's tax liability (if any liability then existed) since said seizure was illegal and said tax liability (if any) remained (even though the respondent's remedy to enforce collection had become barred) until the enactment of Section 1106 of the Revenue Act of 1926, by which last named enactment such liability, if any, became extinguished and was not recreated or revived by the enactment of Section 612 of the Revenue Act of 1928.

7. The collection of the additional tax assessed against the petitioner in September 1920 was never "stayed" within the meaning of the word as used in Section 611 of the Revenue Act of 1928.

At the trial of the case the respondent requested the court to make certain rulings on matters of law, of which the following were made by the court, viz:

(a) That the withholding, delaying and postponement of collection by the Collector in this case, because of the filing of the claim for abatement, was a stay of collection within the meaning of Section 611 of the Revenue Act of 1928.

(b) That the provisions of Section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit.

(c) That the petitioner is not entitled to recover in this action.

The court, in an opinion handed down on the twenty-sixth day of June, 1930, made the following rulings in matters of law:

(1) That judgment should be entered for the respondent.

(2) That Section 611 of the Revenue Act of 1928 defeats the petitioner's right to recover in these proceedings.

(3) That the construction put upon Section 611 of the Revenue Act of 1928 by Judge Dawson in *Wright & Taylor, Inc.*, v. *Lucas*, by Judge Mack in *Regla Coal Co.* v. *Bowers*, and by Judge Deitrich in *Huntley* v. *Giles* is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928 as revealed in Congressional documents.

(4) That resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment of Section 607 and Section 611 of the Revenue Act of 1928, the situation confronting Congress under the earlier laws and the proposed remedy of the new law.

(5) That Section 607 of the Revenue Act of 1928 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the Revenue Laws.

(6) That if Section 611 of the Revenue Act of 1928 does not affect a taxpayer's right to recover by suit taxes collected after the five year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes

paid or collected, after the right to collect had been barred, to those cases where there had been no claim in abatement and no stay of proceedings to collect.

(7) That the right of the petitioner to reclaim taxes illegally collected was withdrawn by the provisions of Section 611 of the Revenue Act of 1928.

(8) That Congress, by Section 611 of the Revenue Act of 1928, undertook to withdraw from a taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against the collection.

(9) That the word "stayed" as used in Section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed" and if there was a voluntary or involuntary delay, following upon or occasioned by a claim in abatement, the collection was stayed.

(10) That a claim for abatement having been filed, there was a stay of the collection of the tax as a consequence of such claim for abatement.

(11) That payments under protest when a taxpayer is threatened with a warrant of distraint should be given the same legal effect as a collection by distraint.

(12) That there can be no justification in law for exempting from the operation of Section 611 of the Revenue Act of 1928 taxpayers who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed.

The court admitted in evidence at the trial of the case the following documents over the objection of the petitioner and subject to its exception, viz:

(a) Restricted waiver of assessment of taxes dated December 15, 1923.

(b) Certain correspondence between the petitioner and the Commissioner and the Collector which was sent and received after the period of limitation had expired.

The petitioner being aggrieved,

(1) by the refusal of the Court to grant the aforesaid rulings of law requested by the petitioner, and

(2) by the granting of the respondent's aforesaid requests for rulings, and

(3) by the aforesaid findings and rulings of the Court, and

(4) by the admission of the aforesaid evidence objected to by the petitioner, now excepts to the refusal to grant the petitioner's said requests and to the granting of the respondent's said requests and to the findings and rulings on matters of law and the admission of evidence above referred to, and therefore brings this its bill of exceptions, and prays that it may be allowed.

By its Attorneys,

ROBERT E. GOODWIN,
HARRIS H. GILMAN.

Assented to.

FREDERICK H. TARR, *United States Attorney,*
by J. DUKE SMITH,
Special Assistant to United States Attorney,
Attorneys for Respondent.

August 26, 1930, allowed by

JAMES A. LOWELL,
United States District Judge.

EXHIBIT A.

Copy [Face of Card:]

FMR No. 9726 Assessed $173,674.61
Claimed 171,223.81

American Glue Co., 121 Beverly Street, Boston.
Assess. list: 1754447: Sept. 1920 addl. p. 21 1 2 47 filed 11/15/20
Kind of tax: Addl Inc and Prof 1917.
Posted F. E. B. 12-23-20 Fwd 1-11-21
Checked by S. C. E. E. E. S.
Attached: Three forms 47, brief in support of claims and letter. from Tp.

Remarks: See brief attached.

4-14-21 Rejected 171,223.81 DI-IT-SA-CR-A TFC
Original given to Miss Collins. 4-23-21 CEQ.

[Reverse side of Card:]

5-11-21 D. L.—IT-SA-CR-JWM—Advising Rej. In Error—
Orig. Given To Miss Collins 7-6-21 HVC

11-6-23: Bureau telegram 11/5 rec'd advising claim being considered. JHR. List noted.

Acct. closed by payment 11/25/25.

EXHIBIT B.

IT:SA:CR WAIVER

American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, in consideration of the assurance given it by officials of the Income Tax Unit of the Bureau of Internal Revenue that its liability for all Federal taxes imposed by the Act of Congress, approved September 8, 1916, as amended by the Act of Congress approved October 3, 1917, for the year ended December 31, 1917 on its net income received from all sources in said year, shall not be determined except after deliberate, intensive and thorough consideration, hereby waives any and all statutory limitations as to the time within which assessments based upon such liability covering items not already assessed may be entered; provided, however, that this waiver is upon the express conditions and subject to the limitations that the total assessment of income and profits taxes on said company for the said year shall not exceed the amount assessed and remaining unpaid on October 30, 1922. It is understood, however, that the above corporation does not, by the execution of this waiver, admit in advance the correctness of any assessment which may be made against it for said year by the officials of the Income Tax Unit.

AMERICAN GLUE COMPANY,
By Jesse P. Lyman
(Corporate Seal) President and Treasurer duly authorized.

(Copy of Accompanying Letter)

Luther F. Speer Counselor on Federal Taxation
Munsey Building

Washington, D. C., December 15, 1923.

Commissioner of Internal Revenue, Washington, D. C.

Re: American Glue Company, IT:SA:CR.

Sir: There is submitted herewith waiver covering the year 1917, duly executed by the taxpayer named above and it is respectfully requested that no assessment be made in this case without the taxpayer being granted the benefits of section 250 (d) of the Revenue Act of 1921.

It is respectfully requested that receipt of this waiver be acknowledged by the Bureau of Internal Revenue.

Respectfully,

LUTHER F. SPEER
Attorney for American Glue Company.

Encl.

EXHIBIT C.

Copy

American Glue Company
Office, 121 Beverly Street, Boston, U. S. A.

Office of the Clerk November 3, 1923.

Collector of Internal Revenue, Little Building, Boston, Massachusetts

Dear Sir: We have your letters of October 24, 1923 and second notice and demand for taxes, addressed to the following companies:

American Glue Company, additional tax	$240,740.68
N. Ward Company	6,190.40
John C. Dow Company	7,738.66

Immediately upon receipt of the above letters and demand for taxes we took up the matter with the tax authorities in Washington and the chief of the Consolidated Section of the Income Tax Unit has promised to reopen the case and telegraph you to this effect.

We have had pending with the tax authorities for two or three years claims for abatement and adjustment of our taxes and no agreement has as yet been reached. We have waited since February, 1923, for some advice from the authorities in Washington with regard to a further hearing or discussion of the items in dispute and your letter of October 24th with a demand notice for additional taxes was the first we have heard from the matter since last February.

At our conference in Washington on October 29th, it was agreed that the assessment notice above mentioned should be recalled and the case reopened for further hearings and discussions and that it was not necessary for us to pay any additional taxes at this time.

This letter is principally for the purpose of insuring that you are acquainted with the situation and, in case you have not received the notice from the authorities in Washington, please let us know promptly as we do not wish to be in the position of not paying proper attention to your letters of October 24th, and notice and demand for taxes.

Yours very truly,

AMERICAN GLUE COMPANY,

JPL : S

J. P. Lyman, Treasurer.

EXHIBIT D.

CLAIM FOR ABATEMENT

Taxes Erroneously or Illegally Assessed

State of Massachusetts

County of Suffolk ss:

American Glue Company 121 Beverly Street, Boston, Massachusetts

This deponent being duly sworn according to law, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to said claim are true and complete:

1. Business engaged in by claimant Manufacturers of Glue, Gelatine, Abrasive Papers and Cloths (Parent Company)

2. Character of assessment or tax Additional Income Profits Tax for 1917.

3. Amount of assessment $173,674.61

4. Amount now asked to be abated . . $171,223.81

Deponent verily believes that the amount stated in item 4 should be abated, and claimant now asks and demands abatement of said amount for the following reasons:

AMERICAN GLUE COMPANY

By Jesse P. Lyman Treasurer.

Sworn to and subscribed before me this 15th day of November, 1920

Roger Upton,

[SEAL] Notary Public.

(1) A brief has been filed by the claimant with the Department of Internal Revenue at Washington, copy of which is hereto attached and made a part of this affidavit, setting forth the reasons why the principal part of this additional tax should not be assessed. On September 16, 1920 a conference was held between the claimant and the Internal Revenue authorities at Washington, at which it was arranged that the claimant should submit additional information to the Department and that in the meanwhile no action would be taken by the Department toward the collection of the additional tax. The claimant is now preparing this additional information, supplementing the reasons contained in the brief hereto annexed and covering the matters not therein contained. The claimant will file a copy of this additional information supplementing this affidavit as soon as it is prepared, and in the meantime requests that it be treated as a part of this claim for abatement.

(2) In a letter to the claimant from G. V. Newton, Deputy Commissioner of Internal Revenue, dated July 12, 1920, it is stated that an additional tax of $5,017.98 has been found to be due from the claimant for the year 1916, and, as the statutory limitation of time allowed for additional assessment had expired, the claimant was requested to waive its right not to be assessed this additional tax. The claimant does not here contest the amount of this addi-

tional tax. The claimant does not here contest the amount of this additional tax, for 1916, and proposes to waive its right not to be assessed. The additional tax is the result of the disallowance of certain deductions amounting to $250,899.46 made by the claimant in its return for the year 1916. As a result claimant's net income for the year 1916 is increased by $250,899.46. This additional income for the year 1916 was not included by the claimant in estimating its consolidated invested capital for the year 1917, nor has any credit for this amount been given to the claimant by the Department of Internal Revenue in re-estimating its consolidated invested capital for the year 1917 on the basis of which additional taxes have been assessed to the claimant and its subsidiary companies. The claimant now alleges that on the Government's computation it is entitled to this addition of $250,899.46, to its consolidated invested capital for the year 1917.

OPINION.

June 26, 1930.

BREWSTER, J. In its petition the American Glue Company seeks to recover accrued income and excess profits taxes for the year 1917 in the amount of $223,263.89, which was collected on a warrant of distraint after the period of limitation established by the Revenue Act of 1921 (Sec. 250 (d)) had expired.

A schedule of important dates follows:

1917 tax return filed,	May 1, 1918
Additional assessment ($173,674.61),	Sept. 1920
Notice and demand for payment,	Nov. 6, 1920
Claim for abatement of $171,223.81,	Nov. 15, 1920
Second notice and demand for payment,	April 29, 1921
Five-year period from date of filing return expired,	April 30, 1923
Third notice and demand for payment,	Oct. 25, 1923
Claim for abatement rejected,	Aug. 18, 1924
Property seized under warrant for distraint ($223,263.89),	Nov. 24, 1925
Claim for refund filed,	Dec. 31, 1925
Claim for refund denied,	Oct. 16, 1926
Suit commenced,	Jan. 15, 1929

It is not denied that when the taxes were collected the rights of the United States were barred by the limitation of the statute and that prior to the enactment of the Revenue Act of 1928 (May 29, 1928) the petitioner's right to recover could not have been questioned.

Bowers v. *New York & Albany Lighterage Co.*, 273 U. S. 346.

It is, however, the contention of the defendant that this right of recovery was taken away by sections 607 and 611 of the Act of 1928. These sections provide:

Sec. 607— Effect of Expiration of Period of Limitation against United States

"Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an 'overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim'."

Sec. 611—Collections Stayed by Claim in Abatement.

" If any internal revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of section 607, relating to payments made after the expiration of the period of limitation on assessment and collection."

The question presented is whether these sections operated to deprive the petitioner of its right to recover taxes collected at a time when the collection was illegal and wholly without warrant of law. The question is not novel. All the arguments pro and con offered by the parties have been submitted to, and considered

by, the Federal courts in a number of cases. Unfortunately the courts are not in accord respecting the interpretation and application of the provisions of these sections. The law is still unsettled respecting the rights of a taxpayer who filed a claim for abatement of a tax seasonably assessed prior to June 2, 1924, and which was collected prior to the enactment of the Act of 1928. There is no controlling decision in point in this circuit. I have, therefore, carefully examined irreconcilable opinions in other jurisdictions and, as a result, have reached the conclusion that the construction put upon section 611 by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas* (34 F. (2d) 328), by Judge Mack in *Regla Coal Co.* v. *Bowers* (37 F. (2d) 373) and Judge Dietrich in *Huntley* v. *Gile* (32 F. (2d) 857, is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928, as revealed in congressional documents. I concur with these judges in the belief that resort may properly be had to reports of legislative committees for the purpose of ascertaining the occasion and necessity for the enactment, the situation confronting the Congress under the earlier laws and the proposed remedy of the new law.

Park Amusement Co. v. *MacCaughn*, 14 F. (2d) 553.

As these congressional reports are fully stated in other opinions cited (see *Huntley* v. *Gile, supra; Wright & Taylor, Inc.* v. *Lucas, supra*), there is no need for repetition here. The purpose of the legislation is apparent. It was to authorize administrative officials to credit or refund, as an overpayment, taxes paid after the expiration of the statutory period of limitation applicable thereto, without regard to the correctness of the assessment. (Section 607.) But such refund or credit was not to be authorized in a case which met the following conditions: (a) an assessment seasonably made prior to June 2, 1924, (b) a claim for abatement filed with or without bond, and (c) a stay of the collection. (Section 611.)

Section 607 created no substantive rights which the taxpayer did not already enjoy except to have his claim recognized by those charged with the administration of the revenue laws. In the Revenue Act of 1924 there was introduced into the amended R.

S., section 3226, a provision sanctioning the maintenance of a suit to recover taxes illegally exacted "whether or not such tax, penalty or sum has been paid under protest or duress". Since the effective date of this Act, it would seem that every taxpayer, who had paid after the rights of the Government to collect by suit or distraint had been barred, could have prevailed in a suit to recover under section 1014 (a) of the Act of 1924, reenacted without change in the Revenue Act of 1926 (section 1113 (a)), and this would be so whether the payment or distraint was prior to the enactment (section 1106 (a)) of the Revenue Act of 1926 extinguishing all liability for the tax.

Bowers v. *Fuller*, 273 U. S. 346.

But if section 607 does not confer substantial benefits upon the taxpayer, it does not follow that section 611 did not deprive a taxpayer of important rights if his case fell within the specified exception. If, as petitioner contends, section 611 does not affect any taxpayer's rights to recover by suit taxes collected after the five-year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes, paid or collected after the right to collect had been barred, to those cases only where there had been no claim in abatement and no stay of proceedings to collect. Judge Dietrich, speaking for the Circuit Court of Appeals for the Ninth Circuit, stated:

> "While textually section 611 is open to construction, upon the whole we are left in no doubt that by it Congress intended to withhold from the taxpayer the right to have refunded money paid by him in the discharge of a valid tax, under the conditions therein stated, where the only objection which could be made to its collection was the expiration of the applicable period of limitation. Otherwise the section is without meaning."

Huntley v. *Gile, supra*, at 858.

Whether we regard section 611 as operating to ratify unauthorized acts (*Wright & Taylor, Inc.* v. *Lucas, supra*; *Regla Coal Co.* v. *Bowers, supra*), or to remove the bar of the Statute of Limita-

tions in certain cases are relatively unimportant considerations. The substance of the matter is that Congress by the section undertook to withdraw from a taxpayer the right to reclaim taxes, otherwise rightfully due, which had previously been held recoverable solely on the ground that they had been paid, or collected, after the statute had run against the collection. *Wright & Taylor, Inc.* v. *Lucas, supra.*

The petitioner doubts the power of Congress to thus deprive a taxpayer of his rights of recovery which existed at the time of the enactment of the Revenue Act of 1928. I do not think any doubt can be seriously entertained in view of authorities.

Stockdale v. *The Insurance Companies*, 20 Wall. 323;
Brushaber v. *Union Pac. R. R. Co.*, 240 U. S. 1;
Rafferty v. *Smith Bell & Co. Ltd.*, 257 U. S. 226;
Smallwood v. *Gallardo*, 275 U. S. 56;
Wright & Taylor, Inc. v. *Lucas, supra;*
Regla Coal Co. v. *Bower, supra;*
Oak Worsted Mills v. *United States*, 36 F. (2d) 529.

In the *Regla Coal Company* case, Judge Mack observed:

"Plaintiff's final contention that, inasmuch as the statute had run at the time of the collection, Congress was then and is still without the constitutional power to remove the bar, cannot be sustained. It is well settled that there is no vested right to rely upon a statute of limitation to defeat a debt or other personal obligation; the Legislature which imposed the bar may remove it. *Campbell* v. *Holt*, 115 U. S. 620, 6 S. Ct. 209, 29 L. Ed. 483; *cf. Decker* v. *Pouvailsmith Corp.*, N. Y. Ct. App., decided October 15, 1929, reported in 252 N. Y. 1, 168 N. E. 442. That because of sovereign grace the expiration of the statutory period not only gave the taxpayer a defense, but also a right to recover taxes paid thereafter, does not, in my judgment, change the result. Nor is this a case like *Davis* v. *Mills*, 194 U. S. 451, 24 S. Ct. 692, 48 L. Ed. 1067, or *Danzer & Co.* v. *Gulf & S. I. R. R. Co.*, 268 U. S. 633, 45 S. Ct. 612, 69 L. Ed. 1126, in which the grant of a

right is conditioned upon its being exercised within a prescribed period; for the right of the United States to these taxes existed prior to and independent of the grant of a limitation statute for the repose of the taxpayer. This result is identical with that reached by the Circuit Court of Appeals for the Ninth Circuit in *Huntley* v. *Gile*, 32 F. (2d) 857, and by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas, supra*, in both of which cases the constitutionalty of section 611 (26 U. S. C. A., sec. 2611) was sustained."

A further contention of the petitioner is that if section 611 be so construed as to affect retroactively a taxpayer's rights to recover taxes paid or collected after their collection was barred by statutes then existing, its rights are not to be destroyed because it presents a case which does not come within the exceptions created in section 611, since there was no compulsory stay of proceedings; in other words, that the delay was voluntary, not under the compulsion of any law, order of court, agreement or act of the taxpayer which placed the Commissioner under a moral obligation to refrain.

Whether this contention can be accepted as valid depends on how the word "stayed", as used in section 611, is to be defined. On this question of interpretation the Federal courts in other circuits are wholly at variance. Some hold that the word was employed in its legal sense and must be limited to a stay compelled by law, by the courts, by agreement or by some act of the taxpayer.

United States v. *Burden Smith & Co.*, 33 F. (2d) 229;
Cutcheon v. *Rafferty*, 34 F. (2d) 708;
Pepsin Syrup Co. v. *Schwaner*, 35 F. (2d) 197;
Sugarland Industries v. *Bass*, 36 F. (2d) 375.

On the other hand, it has been held that the word "stayed" is to be taken as synonymous with "delayed", and if there was a delay following upon, or occasioned by, a claim in abatement the collection was "stayed" whether the delay was voluntary or involuntary.

Regla Coal Co. v. *Bowers, supra*;
Wright & Taylor, Inc. v. *Lucas, supra*;
Oak Worsted Co. v. *United States, supra*;
Goodcell v. *Graham et al.*, 35 F. (2d) 586;
Magee v. *United States*, 37 F. (2d) 763.

My opinion is that the word "stayed" should be given the broader definition. I have reached this conclusion, first, because I regard the reasons advanced by the learned judges who have abscribed to the word the broader meaning to be sound and convincing, and secondly, because the narrower definition robs the section of much of its capacity to meet the situation it was obviously intended to remedy. As has been pointed out in the cases cited, notably the *Wright & Taylor* case and the *Regla Coal Co.* case, in none of the revenue acts extant on June 2, 1924 was there any provision which legally stayed the collection of a tax unless the claim for an abatement was accompanied by a bond. (See Rev. Act of 1918, sec. 234, para. 14 (40 Stat. 1079).) The regulations of the treasury department clearly indicated that such a claim did not stay any proceedings to collect the tax. Reg. 33, Art. 261; Reg. 45, Art. 1032; Reg. 62, Art. 1032. That the legislative body read the word "stayed" to mean "delayed" is shown by a report of the Senate committee which, I think, has not been referred to in other opinions. The finance committee of the Senate recommended that section 611 be entirely eliminated, and in its report it stated:

> "Section 611 of the House bill proposes to extend the statute of limitations, particularly in cases for 1917 and prior years, if an assessment had been made but the collection delayed by the filing of a claim in abatement, and also prohibits the refund of amounts paid after the statute of limitations in such cases. Your committee believes that the bar of the statute should be made effective as to both the Government and the taxpayer and recommends that this section be eliminated."

This section, however, was later restored as it came from the

House with the exception that section 611 (b) was eliminated. Section 611 (b) provided that a distraint, or proceeding in court, could be begun within one year after the enactment of the Act for collection of taxes not already paid which fulfilled the conditions of section 611. I refer to this because petitioner has argued that the congressional records adverted to by the courts are not to be considered as helpful, as these reports dealt with the original section 611 which included 611 (b). But I am unable to see how the elimination of 611 (b) impairs the value of the contemporaneous reports of legislative committees. It was to refunds of taxes already paid that the committee addressed its observations.

Correspondence and a restricted waiver subsequent to April 30, 1923, were introduced tending to show that the delay was at the request of the petitioner. Whether these were sufficient to constitute a legal stay, or whether acts committed after the statute of limitations had run have any important bearing on the applicability of section 611, are questions that need not be decided in view of the conclusion I have reached upon the interpretation of the language of the Act. It is sufficient to find, as I do, that there was a claim for an abatement and a stay of the collection as a consequence of the claim. This brings the case at bar within the exceptions of the section, which defeat petitioner's asserted rights to recover.

Nor do I see any ground for distinction between the case at bar and the cases which have upheld the Government's contention based on the fact that the taxes were collected by distraint rather than paid under protest. Such a distinction would have little of substance to recommend it. Payment under protest when threatened with a warrant of distraint would be given the same legal effects as a collection by distraint. There can be no justification in law for exempting from the operation of section 611 taxpayers who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed. Such a result would give too great singificance to the word "payment" and would be inconsistent with the purposes of the statute. In my

opinion the section must be held to apply as well to one case as the other.

I find and rule, therefore, that section 611 defeats the petitioner's right to recover in these proceedings, and judgment should be entered for the defendant.

PETITION FOR APPEAL OF AMERICAN GLUE COMPANY.

[Filed September 12, 1930.]

Now comes the petitioner, American Glue Company, conceiving itself aggrieved by the findings, rulings and opinion of the court and by the judgment entered in pursuance thereof in the above-entitled cause on the eighth day of September, A. D. 1930, and hereby appeals from said findings, rulings and judgment to the United States Circuit Court of Appeals for the First Circuit for the reasons specified in the assignment of error filed herewith; and it prays that this appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the First Circuit under the rules of such court in such cases made and provided.

And your petitioner further prays that a proper order relating to the required security to be required of it be made.

By its Attorneys,

ROBERT E. GOODWIN,
HARRIS H. GILMAN.

September 15, 1930. Appeal allowed.

JAMES A. LOWELL,
United States District Judge.

PETITIONER'S ASSIGNMENT OF ERRORS.

[Filed September 12, 1930.]

The petitioner in this action in connection with its petition for appeal, makes the following assignment of errors which it avers occurred upon trial of the case, to wit:

I. That the United States District Court for the District of

Massachusetts erred in ruling that the petitioner was not entitled to recover.

II. That the United States District Court for the District of Massachusetts erred in ruling that the petitioner was not entitled to recover under sections 607 and 611 of the Revenue Act of 1928 all interest and penalties, not assessed prior to June 2, 1924, which were collected from it in respect to taxes for the year 1917.

III. That the United States District Court for the District of Massachusetts erred in refusing to grant the requests of the petitioner for rulings of law as follows:

1. "The seizure, under warrant for distraint, of the sum of $233,263.89 from the petitioner on November 24, 1925 by the Collector of Internal Revenue for the District of Massachusetts, was illegal and the petitioner may recover from the United States of America said sum of $233,263.89 with interest thereon from the date of seizure in accordance with the provision of Revised Statutes 3226 as amended by section 1111 of the Revenue Act of 1926.

2. "The sole purpose and effect of section 607 of the Revenue Act of 1928 was to enlarge the class of taxpayers who were entitled to sue and recover under the provisions of section 3226 of the Revised Statutes as amended.

3. "Section 607 of the Revenue Act of 1928 did not limit, take away, or in any way affect any right of action which the petitioner had at the date of its enactment.

4. "Section 611 of the Revenue Act of 1928 did not take away any right of action which the petitioner had at the date of its enactment.

5. "Section 611 of the Revenue Act of 1928 did not by express terms or by implication do more than limit the scope and effect of section 607 of the Revenue Act of 1928 and did not of itself grant any rights or privileges whatsoever.

6. "The illegal seizure of said sum of $233,263.89 in 1925 by the Collector of Internal Revenue did not effect a payment or satisfaction of the petitioner's tax liability (if any liability then existed), since said seizure was illegal and said tax liabil-

ity (if any) remained (even though the respondent's remedy to enforce collection had become barred) until the enactment of section 1106 of the Revenue Act of 1926, by which last named enactment such liability, if any, became extinguished and was not recreated or revived by the enactment of section 612 of the Revenue Act of 1928.

7. "The collection of the additional tax assessed against the petitioner in September, 1920, was never 'stayed' within the meaning of the word as used in section 611 of the Revenue Act of 1928."

IV. The United States District Court for the District of Massachesetts erred in granting the rulings on matters of law requested by the respondent, as follows:

(a) "That the withholding, delaying and postponement of collection by the Collector in this case, because of the filing of the claim for abatement, was a stay of collection within the meaning of section 611 of the Revenue Act of 1928.

(b) "That the provisions of section 611 of the Revenue Act of 1928 apply to the facts of this case and furnish a complete defense to this suit.

(c) "That the petitioner is not entitled to recover in this action."

V. That the United States District Court for the District of Massachusetts erred in making the rulings of law in its opinion handed down on the twenty-sixth day of June, 1930, as follows:

(1) That judgment should be entered for the respondent.

(2) That section 611 of the Revenue Act of 1928 defeats the petitioner's right to recover in these proceedings.

(3) That the construction put upon section 611 of the Revenue Act of 1928 by Judge Dawson in *Wright & Taylor, Inc.* v. *Lucas,* by Judge Mack in *Regla Coal Co.* v. *Bowers,* and by Judge Deitrich in *Huntley* v. *Giles* is the correct construction and the one necessary to give effect to the intent and purpose of the legislation of 1928 as revealed in Congressional documents.

(4) That resort may properly be had to reports of legislative com-

mittees for the purpose of ascertaining the occasion and necessity for the enactment of section 607 and section 611 of the Revenue Act of 1928, the situation confronting Congress under the earlier laws and the proposed remedy of the new law.

(5) That section 607 of the Revenue Act of 1928 created no substantive rights which the taxpayer did not already enjoy, except to have his claim recognized by those charged with the administration of the Revenue Laws.

(6) That if section 611 of the Revenue Act of 1928 does not affect a taxpayer's right to recover by suit taxes collected after the five-year period, then the whole scheme of the legislation fails in its announced purpose to limit refunds of taxes paid or collected, after the right to collect had been barred, to those cases where there had been no claim in abatement and no stay of proceedings to collect.

(7) That the right of the petitioner to reclaim taxes illegally collected was withdrawn by the provisions of section 611 of the Revenue Act of 1928.

(8) That Congress, by section 611 of the Revenue Act of 1928, undertook to withdraw from a taxpayer the right to reclaim taxes (otherwise rightfully due) which had previously been held recoverable solely on the ground that they had been paid or collected after the statute had run against the collection.

(9) That the word "stayed" as used in section 611 of the Revenue Act of 1928 should be taken as synonymous with "delayed" and if there was a voluntary or involuntary delay, following upon or occasioned by a claim in abatement, the collection was stayed.

(10) That a claim for abatement having been filed, there was a stay of the collection of the tax as a consequence of such claim for abatement.

(11) That payments under protest when a taxpayer is threatened with a warrant of distraint should be given the same legal effect as a collection by distraint.

(12) There can be no justification in law for exempting from the operation of section 611 of the Revenue Act of 1928 taxpayers

who, instead of avoiding threatened distraint by payment, allowed the warrant of distraint to be executed.

VI. That the United States District Court for the District of Massachusetts erred in admitting in evidence at the trial of the case the following documents over the objection of the petitioner and subject to its exception:

(a) Restricted waiver of assessment of taxes dated December 15, 1923.

(b) Certain correspondence between the petitioner and the Commissioner and the Collector which was sent and received after the period of limitation had expired.

Wherefore the appellant prays that said judgment be reversed and that said District Court for the District of Massachusetts be ordered to enter a decree reversing the decision of said District Court in said cause.

ROBERT E. GOODWIN,
HARRIS H. GILMAN,
Attorneys for the Appellant,
AMERICAN GLUE COMPANY.

BOND ON APPEAL.

[Filed September 12, 1930; Approved September 15, 1930.]

Know all Men by these Presents, That we American Glue Company a corporation duly incorporated under the laws of Massachusetts, as principal, and American Employers' Insurance Company, a corporation duly organized and existing under the laws of the State of Massachusetts, having an usual place of business in Boston as surety, are held and firmly bound unto the United States of America in the full and just sum of Two hundred and fifty dollars ($250.) to be paid to the said United States of America their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this twenty-eighth day of August in the year of our Lord one thousand nine hundred and thirty.

Whereas, lately at a District Court of the United States for the District of Massachusetts in a suit in depending in said Court between American Glue Company, a corporation duly incorporated under the laws of Massachusetts, and the United States of America judgment was entered against the said American Glue Company and the said American Glue Company having obtained an appeal to remove said cause to the United States Circuit Court of Appeals for the First Circuit, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing them to be and appear in the said United States Circuit Court of Appeals for the First Circuit, in the city of Boston, Massachusetts, on the fifteenth day of October, A. D. 1930.

Now, the condition of the above obligation is such, That if the said American Glue Company shall prosecute its appeal to effect, and answer all damages and costs if it fail to make its appeal good, then the above obligation to be void; else to remain in full force and virtue.

AMERICAN GLUE COMPANY [SEAL]
by ROBERT W. YOUNG, *Treasurer*

AMERICAN EMPLOYERS' INSURANCE COMPANY [SEAL]
By WALDEMAR J. VATTER *Attorney-in-fact.*

Sealed and delivered in presence of
ROGER UPTON

Approved. JAMES A. LOWELL,
United States District Judge.

CITATION ON APPEAL.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES,
To the UNITED STATES OF AMERICA, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the First Circuit, in the City of Boston, Massachusetts, on the fifteenth day of October next, pursuant to an appeal duly obtained from a decree of the District

Court of the United States for the District of Massachusetts, wherein the American Glue Company, a corporation organized under the laws of the Commonwealth of Massachusetts, and having a usual place of business in Boston in said Commonwealth, is appellant, and you are appellee, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES A. LOWELL, Judge of the District Court of the United States for the District of Massachusetts, this fifteenth day of September, in the year of our Lord one thousand nine hundred and thirty.

JAMES A. LOWELL,
United States District Judge.

ACKNOWLEDGMENT OF SERVICE OF CITATION ON APPEAL.

SEPTEMBER 17, 1930.

Service of the within citation is hereby acknowledged.

FREDERICK H. TARR,
United States Attorney,
by J. DUKE SMITH,
Special Assistant to the United States Attorney.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MASSACHUSETTS, ss.

I, James S. Allen, Clerk of the District Court of the United States for the District of Massachusetts, do hereby certify that the foregoing is the transcript of the record on appeal of the petitioner, American Glue Company, including true copies of such proofs, entries and papers on file as have been agreed upon, in the cause entitled,

No. 3510, LAW DOCKET,
AMERICAN GLUE COMPANY, PETITIONER,
v.
UNITED STATES OF AMERICA,

in said District Court determined, together with the original citation with the acknowledgment of service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at Boston, in said District, this eighth day of October, A. D. 1930.

[SEAL] JAMES S. ALLEN, *Clerk.*

CLERK'S CERTIFICATE.

I, Arthur I. Charron, Clerk of the United States Circuit Court of Appeals for the First Circuit, certify that the printed pages numbered 1 to 40, inclusive, hereto prefixed, contain and are a true copy of the record and all proceedings to and including October 17, 1930, in the cause in said court numbered and entitled,

No. 2497.

AMERICAN GLUE COMPANY, PETITIONER, APPELLANT,

v.

UNITED STATES OF AMERICA, APPELLEE.

In testimony whereof, I hereunto set my hand and affix the seal of said United States Circuit Court of Appeals for the First Circuit, at Boston, in said First Circuit, this seventeenth day of October, A. D. 1930.

[SEAL] ARTHUR I. CHARRON, *Clerk.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(123)